NORFOLK FIRE INS. CO. *v.* TALLEY.

June 8, 1911.

[71 S. E. 534.]

Insurance (§ 326*)—Fire Insurance—Provision against Fireworks—General Merchandise Store.—In the absence of fraud or mistake, recovery cannot be had on a fire policy, conditioned to "be void if (any use or custom of trade * * * to the contrary notwithstanding) there be * * * on the above-described premises * * * fireworks," where fireworks were kept in stock in the building at the time of the fire, and this, though the building was insured as a "general merchandise" store, and fireworks are generally kept in such a store; the keeping of them not being necessary in such a business, and this, too, though the prohibition is in the printed part, and the description of the business to be conducted on the premises is in writing, the written part not overriding the printed part, except in case of irreconcilable conflict.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 782-791; Dec. Dig. § 326.*]

Error to Circuit Court, Louisa County.

Action by one Talley against the Norfolk Fire Insurance Company. Judgment for plaintiff. Defendant brings error. Reversed and remanded.

Peatross & Savage and *Gordon & Gordon,* for plaintiff in *Bibb & Bibb* and *Jas. L. Shelton,* for defendant in error.

HARRISON, J. This suit was brought to recover on a policy of insurance issued by the defendant company, insuring against loss by fire a certain building in the county of Louisa, used at the time as a store for general merchandise purposes. There was a verdict and judgment in favor of the plaintiff, to which this writ of error was awarded.

The first assignment of error, which was to the action of the circuit court in overruling the demurrer to the declaration, was properly abandoned at bar.

A number of defenses were made by the defendant, and a number of assignments of error have been taken to the rulings of the circuit court, and discussed here; but, in our view of the case, there is one defense which conclusively settles the controversy in favor of the defendant, and therefore it will not be necessary to deal with others.

Among other provisions, the policy sued on contains the following condition: "This entire policy shall be void if (any usage or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises * * * fireworks."

Notwithstanding this express provision forbidding it, fireworks were kept in stock, and were in the building when the fire occurred. Over the objection of the defendant, the circuit court permitted the introduction of evidence tending to show that it was customary for general merchandise stores in Louisa county to carry fireworks as a part of their stock in trade, and instructed the jury that, although they believed from the evidence that fireworks were in the store at the time of the fire, yet if they believed that such goods were kept in general merchandise stores in the course of trade, and this was the custom and habit of such stores in that section, that then the keeping of such fireworks could not be a bar to recovery under the policy sued on.

These rulings of the circuit court were clearly erroneous. Contracts of insurance are subject to the same rules of construction that are applicable to other written contracts. Home Ins. Co. *v.* Gwathmey, 82 Va. 923, 1 S. E. 209; U. S. Mut. Accident Ass'n *v.* Newman, 84 Va. 52, 3 S. E. 805; Watertown Fire Ins. Co. *v.* Cherry, 84 Va. 72, 3 S. E. 876; Insurance Co. *v.* Devore, 88 Va. 778, 14 S. E. 532.

There is neither fraud nor mistake alleged in the execution of the policy in question. It is not denied that the plaintiff knew what the policy contained, but it is contended that the provision in question did not affect the right of the insured to keep and sell fireworks in the insured property, because it was usual in that county for general merchandise stores to keep and sell such goods; that the term "general merchandise" embraces fireworks, and the right to sell is implied, although the prohibition is express. This position cannot be sustained. The fact that fireworks are usually kept in country retail stores does not authorize their being kept and sold by one who has contracted in writing that he will not deal in them, and that the policy shall be void if violated in that particular. The reason for the prohibition may have arisen from the fact of the custom of selling fireworks in country stores; for, if the article was never found in such stocks, its prohibition would be useless.

The keeping of fireworks was a hazard which the premium paid did not cover, and its prohibition was, therefore, a material part of the contract, of the benefit of which the company could not be deprived because others kept fireworks in their stores. Assurance Co. *v.* Rector, 85 Ky. 294; 3 S. W. 415; Beer *v.* Insurance Co., 39 Ohio St. 109; Sperry *v.* Insurance Co. (C. C.) 26 Fed. 234; Steinbach *v.* Insurance Co., 13 Wall. 183, 20 L. Ed. 615; Insurance Company *v.* Gunther, 116 U. S. 113, 6 Sup. Ct. 306, 29 L. Ed. 575.

There are cases relied on by the plaintiff, where the policy or its meaning has been interpreted in the light of the circumstances surrounding its execution, as where a building insured was being used for the manufacture of certain articles that required the use of inflammable material, and without which the building and the business in it would have been useless. In such cases it has been held that the right existed to keep and use everything necessary or essential to the manufacture of the articles, although forbidden; consent having been given by the company that the building insured might be used for the purpose of manufacturing the particular article. This line of cases has no application to the case at bar, where the business conducted in the building insured was a general merchandise business. Keeping and selling fireworks is in no sense necessary or essential in such a business. The privilege of keeping fireworks as part of such a stock might, for a cheaper rate of insurance, well be surrendered without impairing the business.

Nor can plaintiff's contention that the printed portion of the policy, containing the prohibition against fireworks, is overridden by the written portion, which describes the property and its uses for general merchandise purposes, avail to enable her to introduce parol evidence as to a custom, because the rule that the written overrides the printed part of a policy only applies where the conflict between the written and printed parts is irreconcilable. The written and printed parts of a policy must, if possible, be construed together so as to give effect to both, and the written part of a policy never overrides the printed part, except when the two are inconsistent, and not capable of a reasonable interpretation when read together. One clause of a policy should never be segregated and an effect given to it inconsistent with the apparent intention of the parties as gathered from the whole instrument. Merchants' Ins. Co. *v.* Edmond, 17 Grat. 138.

In the case at bar there is no conflict between the written and the printed parts of the policy. The intention of the parties is apparent, and each part is clear and easily understood. Both can stand together without the slightest difficulty in reconciling them.

The meaning of the clause of the policy in question is plain. The plaintiff expressly undertook, by accepting the policy, not to claim the benefit of any custom contrary to the terms of the policy, and in accepting the policy at the premium named she surrendered the right to carry in stock such articles customarily carried in such stores as are expressly prohibited by the terms of the policy.

In Ostrander on Fire Insurance (2d Ed.) § 329, the author says: "But it will be otherwise if the policy distinctly prohibits the using or keeping of dangerous articles particularly specified. Custom and ordinary use will create a presumptive right only

when the contract is silent or its meaning uncertain. The insurer has unquestionably the privilege to decline acceptance of a risk, except on conditions which he may impose; and as to whether such conditions are reasonable he has the power of ultimate decision. The parties do not come together by compulsion. There is an absolute freedom of choice. They may agree on terms, advantageous or otherwise, or they may refuse to agree altogether; but when the minds of insurer and insured have met, and the terms of their agreement are distinctly set forth in the policy, there is nothing for the courts to construe, and it is not for them to say that particular things cannot be prohibited because of their customary use in connection with the business to which the insurance relates. In consideration of the insurer's promise of indemnity at a rate of premium named, the insured surrenders somewhat of the uses and privileges that he has ordinarily enjoyed in the occupation of his premises, or in the management of his business. Whether he has acted wisely or not is immaterial. He has exercised his natural and his constitutional right to make his own contract, and that is an end of the matter."

To enforce the payment of this policy in the face of the plain and unwarranted violation of the written agreement of the parties that fireworks should not be kept on the insured premises would be to remove all safeguards embodied in the contract of insurance for the protection of the insurance company.

As said by Judge Keith in Westchester Fire Ins. Co. *v.* Ocean View Co., 106 Va. 633, 56 S. E. 584, referring to a clause like that under consideration: "It was a lawful condition and recklessly violated; and, if it be not sufficient to protect the insurance company against loss, it would seem to be an idle task to write conditions into a policy."

The reasons given, the defendant company was plainly entitled to a judgment. Therefore the judgment of the circuit court in favor of the plaintiff must be reversed, the verdict set aside, and the cause remanded for further trial, if the plaintiff shall be so advised, not in conflict with the views herein expressed.

Reversed.

Note.

Although the court decides this case very summarily, and treats the contention of the defendant in error as to the admissibility of evidence of a general custom to keep fire-works in a general merchandise store such as that insured, and where the loss occurred, as being without any foundation in law or reason, yet a careful examination of the authorities, both decisions and textwriters, reveals, not only a respectable support for such contention, but that the decided weight of authority is in its favor. The court quotes from one textwriter (Ostrander), and the quotation is not particularly pertinent, as the author is not considering the case of a written term descriptive of the risk as modifying a printed condition inconsistent therewith, but merely the general undeniable proposition that the

express terms of the policy must govern and usage or custom cannot countervail them. True of course, but that does not seem to us to be the point here. The real question is, what does the contract say as to fireworks? If the parties use a form containing a printed prohibition against them, and nothing written necessarily in conflict therewith, the printed clause of course is the contract, as the court says, and no custom or usage of business can be shown to change it. But when they write into the policy a term descriptive of the risk, "a store for general merchandise purposes," which can be shown by general custom and usage to connote the risk of carrying fire-crackers in stock, then the parties have made *that* their contract and it is more reasonable to suppose that the printed term was left in by oversight or indifference, than to allow it to defeat the express agreement of the parties that a store for carrying a stock of general merchandise (including by general usage fire-crackers) was thereby insured against fire. By the use of a term including them they are "specially provided for in writing on the policy." Niagara Fire Ins. Co. *v.* DeGroff, 12 Mich. 124. As a textwriter expresses it: "Where there is anything in the written portion of the policy, or in the description of the property itself, that shows that any articles within the prohibited class are to be kept, the force of the printed clause is overcome, as the writing evidently expresses the understanding of the parties when the contract was actually made, while the printed portion of the policy only embodies the general terms upon which insurance, in the absence of special agreement, is made." Wood on Insurance, § 69, quoted in Tubb *v.* Liverpool, etc., Ins. Co., 106 Ala. 651, 17 Sou. 615, 617. See to same effect, I May on Insurance, § 239; Fland. Ins. 309; 2 Bid. Ins. § 752.

The court states the undeniable proposition that contracts of insurance are subject to the same rules of construction that are applicable to other written contracts, and cites four Virginia cases therefor. In the next paragraph the court states the plaintiff's claim, but, with great deference, we hardly think correctly, as being to an "implied" right to sell fire-crackers, after having "contracted in writing that he will not deal in them," etc. It does seem to us that this begs the question. That is the very point at issue—did he so contract? Or did he buy insurance on a store to be used for general merchandise (including fire-crackers)? Upon the true answer to this question turns this case. See Phoenix Ins. Co. *v.* Walters, 24 Ind. App. 87, 56 N. E. 257 (set out infra under "Indiana"). Where this point as to its not being an implied permission claimed is expressly held.

In the next paragraph, the court lays down the proposition that: "the keeping of fire-works was a hazard which the premium paid did not cover, and its prohibition was, therefore, a material part of the contract, of the benefit of which the company could not be deprived because others kept fire-works in their stores," and citing therefor five cases, which we will allude to again. This is true of course, but for the reason above stated, it begs the question, as it assumes as settled the very point at issue: what was the written contract?

Then the court takes up the real point of the plaintiff's case, that the written description of the risk assumed should prevail over a general printed prohibition, and dismisses it very summarily without citing any additional authority for so doing, except one Virginia case to the point that the written and printed portions of a policy should be constructed together, if possible, so as to give effect to both.

The line of cases which, as we shall see, support the plaintiff's

position are dismissed as cases where the policy or its meaning has been interpreted in the light of the circumstances surrounding its execution, as allowing the use of articles essential to the business to be carried on and for which the insurance was made, although such use was forbidden in the policy. The court says these cases have no application here.

TEXT WRITERS.

And now, in considering the authorities, let us take up those supporting the plaintiff's position. Among the text writers, Wood, in his work on Insurance, in treating of repugnant stipulations as to the subject-matter of the risk, says: "Where the written portion of the policy describes the property insured as of a certain class, and the property as described embraces a class of articles ranked in the policy as hazardous, or which, by the printed terms of the policy, are prohibited, as if the goods are described as a stock, 'such as is usually kept in a country store,' and the printed portion of the policy prohibits the keeping of certain articles usually kept in a country store, the written portion of the policy overcomes the force of the printed stipulations, and the keeping of such articles does not operate as a breach of the conditions of the policy. Thus, where a policy covered property described as a stock 'such as is usually kept in a general retail store,' and the keeping of gunpowder was prohibited by the printed portion of the policy, it was held that if gunpowder formed a part of the stock usually kept in a 'general retail store,' the keeping of gunpowder was not a violation of the conditions of the policy;" and so of other prohibited articles coming within the class of articles described by general designation; and he adds, "it may always be shown that such articles are usually kept as a part of the stock of the class insured and if proved, the printed prohibitory clause is overcome by the written description of the class of property insured.' 1 Wood, Ins. § 64. Again, he says in section 69: "Where there is anything in the written portion of the policy, or in the description of the property itself, that shows that any articles within the prohibited class are to be kept, the force of the printed clause is overcome, as the writing evidently expresses the understanding of the parties when the contract was actually made, while the printed portion of the policy only embodies the general terms upon which insurance, in the absence of special agreement, is made." Quoted in Tubb *v.* Liverpool, etc., Ins. Co., 106 Ala. 651, 17 South. 615, 617. See, also, Collins *v.* Farmville Ins. Co., 79 N. C. 279, 28 Am. Rep. 322, where similar statements are quoted from Wood on Ins., p. 840.

"May states the rule to the same effect, as follows: 'And it may be stated as a general proposition that where, in the description of the subject-matter of insurance, a stock of goods or property embarked in a particular trade or manufacture, or any branch of business, is stated to be insured without qualification or exception, the policy covers all such special articles of merchandise, processes, practices, subordinate trades, and manufactures, as are necessarily or usually included in or incidental to the general subject-matter of insurance, notwithstanding the policy may provide, by a general printed stipulation, that if the premises shall be used for, or appropriated to the storing or vending of articles, or the carrying on of any trade, vocation, or business denominated hazardous, extra-hazardous, or enumerated in the memorandum of special rates, the policy shall be void, and such included and incidental matters are within the excepted specifications.' I May, Ins. § 239. The rule is based

on what is presumed to be the intention of the parties, that the entire subject-matter with all its incidents is to be protected, 'and upon the further presumption that the written special description of the particular subject-matter, whenever inconsistent with special printed clauses, must control;' a proposition, he adds, which has been established and illustrated by numerous adjudged cases, to which he refers. To the same effect is Fland. Ins. 309. Counsel for appellee relies much on the case of Steinbach *v.* Insurance Co., 13 Wall. 183, which seems to be the leading case, usually cited as opposed to the rule as laid down above. In that case, the subject insured was described as, 'On his stock of fancy goods, toys and other articles in his line of business, * * * as a German jobber and importer. Privileged to keep fire-crackers.' In the printed part of the policy, fireworks were prohibited, and articles of the class to which they belonged, added 50 cents more to the rate per $100 and to be covered, were required to be specially written on the policy. The plaintiff proposed to prove, 'that fireworks constituted an article in the line of business of a German jobber and importer.' In a very brief opinion, without reference to an authority, the court decided, that the evidence was inadmissible. It was assigned as a reason for so holding, that 'the policy itself requires that fireworks shall be specially written in it. They are among the goods described as specially hazardous, and add 50 cents on the $100 to the ordinary rate of insurance,' and that it was impossible to think they were described by the general terms used in the policy. This case is clearly distinguishable from the class of cases such as we have on hand, as was held by Gresham, D. J., in Stout *v.* Assurance Co., 12 Fed. 554, and in Plinsky *v.* Insurance Co., 32 Fed. 47. But, if the case cited does conflict with the general doctrine as stated, it is opposed to the decisions of many of the state courts, and to the text books above referred to on the subject. It is not denied that there are decisions holding to a contrary view, but the preponderance and weight of authority seem to sustain the view we take. Barnum *v.* Insurance Co., 97 N. Y. 188; Steinbach *v.* Insurance Co., 54 N. Y. 90. Without referring specially to the decided cases on the subject, they will be found collated under the sections in the text books to which we have referred, and in 2 Bid. Ins. § 752." Tubb *v.* Liverpool, etc., Ins. Co., 106 Ala. 651, 17 Sou. 615, 618. See, also, Richards on Insurance, § 149.

"'Goods usually kept in country stores,' or words to that effect, include turpentine and powder where the evidence shows that they are usually kept in such stores, though they are denominated extra-hazardous and their keeping is prohibited in the printed portion of the policy. Pindar *v.* Kings County F. Ins. Co., 36 N. Y. 648, 93 Am. Dec. 544; Whitmarsh *v.* Conway F. Ins. Co., 16 Gray (Mass.) 359; Pittsburgh Ins. Co. *v.* Frazee, 107 Pa. St. 521, 14 Ins. L. J. 512; Kenton Ins. Co. *v.* Downs, 90 Ky. 236, 19 Ins. L. J. 923; Yoch *v.* Home Mut. Ins. Co., 111 Cal. 503. See also, Barnard *v.* National F. Ins. Co., 27 Mo. App. 26." 13 Amer. & Eng. Enc. of Law, p. 295.

Mercantile Establishment.—"So notwithstanding the policy contains a clause prohibiting the keeping of powder, saltpetre, fireworks, oils, and other such inflammable materials, yet if they are usually kept as a part of the stock in trade, or are used in the prosecution of the business named, they are covered by the policy, and their use does not, according to the weight of authority, work its forfeiture by reason of the prohibitory clause. Thus a policy upon a stock of goods 'usually kept in country stores,' a 'general retail store,' a grocery, or a drug store, or one upon a stock of 'fancy

goods, toys, and other articles,' or upon stock 'usually kept for sale in confectionery stores,' or in a dry-goods store, or one on a stock of 'fancy goods' and 'Yankee notions,' will usually cover such articles as turpentine, powder, gasoline, fire works, saltpetre, or cotton in bales, when they are shown to constitute a part of such stocks according to the usual custom of the locality where the insurance is effected, though such articles may be inhibited in the printed portions of the policy, and though it may provide that their keeping avoids the insurance." 13 Amer. & Eng. Enc. of Law, pp. 294, et seq.

Effect of Custom of Business.—"It has repeatedly been held that a breach of a printed condition of a policy against the keeping of certain substances does not preclude recovery when the subject-matter insured was known to the insurer to be such that the use of these substances was a necessary and usual incident of the business, provided that such substances be kept only in such quantities and used only in such manner as was necessarily and usual. When the goods are insured under general terms, such as 'Yankee notions, 'articles usually kept for sale in retail drug stores,' 'merchandise such as is usually kept in a country store,' 'merchandise usually kept for sale in a retail hardware store,' 'groceries,' etc., proof of custom is always admissible to complete the description. Hence printed provisions of such policies prohibiting the keeping of articles customarily sold in such places are repugnant to the actual agreement, and a breach therein does not affect the insurance." 19 Cyc., p. 737. See numerous cases in exhaustive notes to Lancaster Fire Ins. Co. *v.* Lenheim, 33 Am. Rep. 778; Birmingham Fire Ins. Co. *v.* Kroegher, 24 Am. Rep. 147.

DECIDED CASES.

Alabama.—In Tubb *v.* Liverpool, etc., Ins. Co., 106 Ala. 651, 17 Sou. 615, the court held that where a policy of fire insurance on a stock of goods in a country store contained a printed stipulation that benzine, fireworks, etc., should not be kept without the consent of the insurer, and a written provision covering a stock of goods "such as is usually kept for sale in country stores," proof was admissible, in an action on the policy, to show that the prohibited goods came within the written clause. The court said: "In Bolman *v.* Lohman, 79 Ala. 67, it was held, that in interpreting instruments partly written and partly printed, the greater weight should be given to that which is written, for the presumption is, that greater attention was bestowed on the written parts; that a printed form is intended for general use, without reference to particular objects and aims, and that which is written is supposed to be dictated by the particular intention and purpose of the parties contracting. Thornton *v.* Railroad Co., 84 Ala. 109, 4 South. 197. In construing contracts of insurance, another settled rule of construction is, that courts, being strongly inclined against forfeitures, will construe all the conditions of the contract and the obligations imposed, liberally in favor of the assured, and strictly against the insurer. Insurance Co. *v.* Young, 58 Ala. 476; Insurance Co. *v.* Johnston, 80 Ala. 467, 2 South. 125; Insurance Co. *v.* Catchings, 104 Ala. 176, 16 South. 46, 50. And so, it is held, that where the terms of a policy are susceptible, without violence, of two interpretations, the construction most favorable to the insured should be adopted; and, in a case where it is doubtful what goods are covered by the policy, the doubt will be resolved against the insurer, and evidence will be admissible to resolve the doubt. 1 Wood, Ins. 142; 2 May Ins. § 420. The foregoing do not

in any wise conflict with other well understood rules for the construction of a policy of insurance,—that by the acceptance of the policy the assured is estopped to deny his assent to its express stipulations (Brown *v.* Insurance Co., 86 Ala. 192, 5 South. 500; Insurance Co. *v.* Smith, 92 Ala. 430, 9 South. 327); and that, where a policy contains language of ambiguous or of doubtful meaning, or some of its terms are inconsistent with others, parol evidence of usage is admissible, so as to arrive at the intention, understanding and agreement of the parties, but that it can never overturn the positive requirements of the law, or the express contract of the parties. Buyck *v.* Schwing, 100 Ala. 355, 14 South. 48; Railroad Co *v.* Hissong, 97 Ala. 191, 192, 13 South. 209; Barlow *v.* Lambert, 28 Ala. 708."

California.—"Gasoline kept as part of the usual stock of merchandise will not avoid a policy in which a written description of the property insured names such stock 'as is usually kept in country stores,' although a printed condition declares that the policy shall be void if certain articles, including gasoline, are kept, used or allowed on the premises." Yoch *v.* Home Ins. Co., 111 Cal. 503, 34 L. R. A. 857.

"A contract of insurance is to be interpreted by the same rule as is any other contract. It must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable. If it is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. The whole contract is to be taken together. When it is partly written and partly printed, the written parts control the printed parts, and, if there is any repugnancy between the two, the printed part must be disregarded. It may be explained by reference to the circumstances under which it was made. In cases of uncertainty it is to be interpreted most strongly against the party who caused the uncertainty to exist. Civ. Code, §§ 1636-1654. Applying these rules to the contract in the present case, it must be held that it was the intention of the defendant to insure gasoline, if it was an article usually kept in country stores, and that, if such was its intention, it was no violation of the policy for the insured to keep gasoline upon the premises as a part of the stock of merchandise. When the defendant agreed to insure a stock of merchandise 'such as is usually kept in country stores,' it must be presumed to have known the character of the merchandise which is usually kept in country stores, and that gasoline was one of these articles, and, consequently, that its policy covered all such merchandise. Harper *v.* Albany Mut. Ins. Co., 17 N. Y. 194; Pindar *v.* Kings County F. Ins. Co., 36 N. Y. 648, 93 Am. Dec. 544. The court would have no judicial knowledge of the character of merchandise which is usually kept in country stores, and it was therefore competent to offer evidence upon that point, for the purpose of enabling it, when interpreting the language of the policy, to understand the matter to which it related and the circumstances under which it was made. Elliott *v.* Hamilton Mut. Ins. Co., 13 Gray, 139; Whitmarsh *v.* Conway F. Ins. Co., 16 Gray, 359, 77 Am. Dec. 414; Archer *v.* Merchants' & Mfrs. Ins. Co., 43 Mo. 434; Maril *v.* Connecticut F. Ins. Co., 95 Ga. 604, 23 S. E. 463, 30 L. R. A. 835; Frain *v.* National F. Ins. Co., 170 Pa. 151; Wood, Ins. § 64. May, Ins. § 239. When it was shown that gasoline is one of the articles which is usually kept in country stores, the court correctly held that it was a part of the subject of the insurance, and that the insured did not violate the policy by

keeping it in stock." Yoch *v.* Home Mut. Ins. Co., 111 Cal. 503, 34 L. R. A. 857, 858.

Indiana.—In Phenix Ins. Co. *v.* Walters, 24 Ind. App. 87, 56 N. E. 257, a policy on a stock of hardware provided that, notwithstanding any usage or custom of trade or manufacture, the keeping, using, or allowing dynamite on the premises should render the policy void, unless otherwise provided by agreement indorsed on or added to the policy. An attached slip provided that the insurance should cover merchandise usually kept for sale in a retail hardware store. Held, that liability on the policy could not be avoided because dynamite was kept in stock, if it were usual to keep it where the stock was located. The court said: "If, by the terms of the attached slip, dynamite be included in the property insured upon the premises, then, of course, it will not render the policy void to keep dynamite on the premises. The property described in the slip, besides certain particularly specified kinds, was also 'such other merchandise as is usually kept for sale in a retail hardware store,'—all while contained in the certain hardware store described, in the particular locality named. What other merchandise was thus included could not be known judicially from a mere examination of the written instrument, but was a question to be determined upon evidence showing whether or not dynamite was usually kept for sale in retail hardware stores in the region where this store was located. It was a question of fact. The matter for decision is not one involving a question merely as to an implied permission arising from a necessity or a usage or custom in a permitted trade or manufacture, authorizing the keeping of an article excepted or forbidden by the general provisions of the policy; but here the description of the property inserted in the policy at the time of its execution, by means of a slip, which by the terms of the policy is to have controlling effect, expressly embraces dynamite, if it can be proved to be an article of merchandise usually kept for sale in a retail hardware store. The adjudicated cases involving the construction of policies with various shades of verbal differences, and the comments of text writers, sustain sufficiently the conclusion which we have thus reached." Citing Wood, Ins. §§ 64, 206; May, Ins. §§ 233-239; Whitmarsh *v.* Insurance Co., 16 Gray, 359; Pindar *v.* Insurance Co., 36 N. Y. 648; Steinbach *v.* Insurance Co., 54 N. Y. 90; Hall *v.* Insurance Co., 58 N. Y. 292; Maril *v.* Insurance Co., 95 Ga. 604, 23 S. E. 463, 30 L. R. A. 835; Insurance Co. *v.* De Graff, 12 Mich. 124; Carrigan *v.* Insurance Co., 53 Vt. 418; Collins *v.* Insurance Co., 79 N. C. 279; Insurance Co. *v.* Taylor, 5 Minn. 492 (Gil. 393); Faust *v.* Insurance Co., 91 Wis. 158, 64 N. W. 883, 30 L. R. A. 783; Stout *v.* Assurance Co., 11 Biss. 309, 12 Fed. 554; Harper *v.* Insurance Co., 17 N. Y. 194; Fraim *v.* National Fire Ins. Co., 170 Pa. St. 151, 32 Atl. 613; Carlin *v.* Assurance Co., 57 Md. 515; Archer *v.* Insurance Co., 43 Mo. 434; Viele *v.* Insurance Co., 26 Iowa, 9, 66; Insurance Co. *v.* McLaughlin, 53 Pa. St. 485.

Massachusetts.—In Whitmarsh *v.* Conway Fire Ins. Co., 16 Gray, 359, the insurance was on a "stock in trade, consisting of the usual variety of a country store, except dry goods," with "permission to keep and sell burning fluid and gunpowder," and provided that if certain enumerated articles, denominated hazardous, extra-hazardous, and risks prohibited, were kept on the premises, the policy should be void, unless they were specially provided for. Held, that the keeping of some of such enumerated articles did not avoid the policy, they being such as are usually kept in a country store, and that parol evidence was admissible to prove that fact. The articles

in question were oil, friction matches, glass and earthenware. This followed Elliott *v.* Hamilton Mutual Insurance Co., 13 Gray, 139, where the insurance was on "goods usually kept in a country store," and the prohibition was of "cotton or woolen waste or rags," and it was held, not to cover clean, white cotton rags, if usually forming part of the stock of a country store. (The mere description of the premises as "a provision and grocery store," would not, however, outweigh an express prohibition. Whitmarsh *v.* Charter Oak Ins. Co., 2 Allen, 581).

This, it will be noted, is a later case than Macomber *v.* Howard Fire Ins. Co., 7 Gray, 257, and attempts to distinguish that case as follows: "The case of Lee *v.* Howard Fire Ins. Co., 3 Gray, 583, cited by the defendants' counsel, differed from the present case in this respect, that there was nothing in the description of the articles insured that could, either directly or by reference, include a grist-mill. The cases of Macomber *v.* Howard Fire Ins. Co., 7 Gray, 257, and Witherell *v.* City Fire Ins. Co., ante, 276, differed from this in making no mention of the usual practice, which these plaintiffs offered to prove." Whitmarsh *v.* Conway Fire Ins. Co., 16 Gray, 359, 363.

Michigan.—In Niagara Fire Ins. Co. *v.* DeGraff, 12 Mich. 124, the insurance was on a stock of "groceries," with an exception of alcoholic liquors, unless specially provided or agreed to in writing on the policy. Held, that the liquors were covered if the jury should find them to be "groceries." The court said: "By the use of a term including them they are 'specially provided for in writing on the policy.' Insuring a class of goods includes what is usually contained in it, whether extra hazardous or not."

Minnesota.—"Property insured was described in the policy, in writing, as a 'stock of goods, consisting of a general assortment of dry goods, groceries, crockery, boots and shoes, and such goods as are usually kept in a general retail store,' etc. One of the printed conditions prohibited the storing or keeping of gunpowder in any building insured or containing merchandise insured. Held, in an action on the policy, that the written clause controlled the printed one, and if gunpowder was usually kept in a retail store, it was not covered by the prohibition. Phoenix Ins. Co. *v.* Taylor, 5 Minn. 492 (Gil. 393)." 28 Cent., cols. 851, 1441, where other cases will be found.

Mississippi.—"Where, by a printed clause in a policy of fire insurance, the keeping of certain articles is prohibited, but such articles are embraced in the fair import of the written words used in describing the goods insured, the latter will prevail, and the keeping of such articles will not avoid the policy. Liverpool & London Ins. Co. *v.* Van Os, 63 Miss. 431, 56 Am. Rep. 810." 28 Cent., col. 852, where other cases will be found.

But where a fire policy described in writing the goods insured as "a general stock of merchandise, consisting of dry goods, clothing, and groceries," and by a printed clause it was provided that the policy should be void if the assured should keep gunpowder without consent: Held, that to excuse the keeping of gunpowder by the assured it was necessary to show that it was included in the fair import of the words "dry goods, clothing, and groceries;" it being insufficient to show that persons keeping a general stock of merchandise usually kept gunpowder as a part thereof. Liverpool, etc., Ins. Co. *v.* Van Os, 63 Miss. 431, 56 Am. Rep. 810. 28 Cent., col. 852.

Montana.—"Since a policy insuring 'articles usually kept for sale in retail drug stores' covers gasoline, benzine, and ether, the keeping

of such articles in reasonable quantities on the insured premises is permitted, and will not avoid the policy, though a printed condition therein declares in effect that, unless otherwise provided by agreement indorsed thereon or added thereto, the policy shall be void if there be kept benzine, ether, or gasoline, notwithstanding any custom or usage of trade may permit them to be kept. Ackley *v.* Phenix Ins. Co. of Brooklyn, 64 P. 665, 25 Mont. 272." 11 Dec. Dig., p. 369.

New York.—In Steinback *v.* La Fayette F. Ins. Co., 54 N. Y. 90, plaintiff was insured "on his stock of fancy goods, toys and other articles in his line of business," in a building "now in his occupancy as a German jobber and importer," with permission to keep firecrackers. The policy provided that if the premises should be used for keeping therein goods denominated specially hazardous in the second class of hazards annexed, except as therein specially provided for, then, so long as so used, the policy to be of no effect. In the class referred to were "fire works," and it was stated that insurance thereon added fifty cents per $100 to the rate. Plaintiff kept fireworks, and by their accidental ignition a loss happened. The court held that if fireworks were usually kept in that line of business, the policy was not avoided, and also held that the insurers were bound to know the nature and kind of articles belonging to the business and occupation insured. This case was on a policy precisely like that construed by the Supreme Court of the United States, in Steinbach *v.* Insurance Co., 13 Wall. 183, 20 L. Ed. 615, decided the opposite way, which became the leading case the other way. See to same effect Barnum *v.* Merchants' Fire Ins. Co., 97 N. Y. 188.

North Carolina.—In Collins *v.* Farmville Ins. Co., 79 N. C. 279, 28 Am Rep. 322, a policy of fire insurance covered a stock of "drugs and medicines," and contained a stipulation that the policy should be avoided if the insured shall keep gunpowder, fire works, saltpetre, etc. Held, that the prohibition was not against keeping saltpetre as a drug, but only in such manner or quantity or for such purpose as would increase the risk; and where saltpetre was on hand as a part of the stock of drugs at the time the policy issued, being an article usually kept in drug stores, it was as a part of the stock insured, and although specially prohibited by the terms of the policy, the policy was not thereby avoided. The court said: "A substantial compliance with a contract is all that is required in any case. Where there has been a substantial compliance and good faith, technicalities will be disregarded by the courts. The saltpetre which was in the stock as a drug, kept and sold as a drug, was insured; it was forbidden to be kept or used otherwise than as a drug, and in such manner, or quantity, or for such purpose as would increase the risk."

Pennsylvania.—In Franklin Fire Insurance Co. *v.* Updegraff 43 Penn. St. 350, the insurance was on merchandise such as is usually kept in country stores. Hardware, china, glassware, looking-glasses, etc., were classed in the policy among hazardous risks to be inserted in the policy or the policy would be avoided. Held, that they were covered, if usually kept in country stores, and this was a question of fact.

In Lancaster Fire Insurance Co. *v.* Lenheim, 89 Pa. St. 497, 33 Am. Rep. 778, a fire policy insured a stock of "general merchandise of all kinds usually kept in a country retail store," except as hereinafter provided." Immediately following this was an exemption from liability for loss where "turpentine or benzine" were deposited, stored, kept, or used, without written consent on the policy.

The insurance clause was written: the exempting clause was printed. The insured kept for sale both turpentine and benzine without such consent. Held, that the policy was void, although those articles might be part of the merchandise usually kept in such stores. In an exhaustive note to this case the reporter cites numerous cases showing that the decision is opposed to the weight of authority.

The case of Birmingham Fire Ins. Co. *v.* Kroegher, 83 Pa. St. 64, 24 Am. Rep. 147, is distinguishable from the case of Manchester Fire Ins. Co. *v.* Lenheim, 89 Pa. St. 497, 33 Am. Rep. 778. In the former case a policy of insurance upon the "stock of merchandise contained in store" was conditioned to be void if the assured should keep there petroleum. At the time the insurance was effected, the assured kept, with the knowledge of the insurer's agent, one barrel of petroleum for sale and for lighting purposes, and continued afterward to keep that amount. It was held that the policy was avoided. The words "stock of merchandise contained in store," are not descriptive of a class of goods. It was argued that the word merchandise meant such as is usually kept in a country store. They asked to have implied what was expressed in the latter case by the term "general merchandise of all kinds usually kept in a country retail store." The former case seems distinguishable from the case sustaining the rule where goods are insured under general terms proof of custom is admissible to complete description.

In Yoch *v.* Home Mut. Ins. Co., 111 Cal. 503, 34 L. R. A. 857, 859, it was said: "Counsel for appellant has cited the case of Lancaster F. Ins. Co. *v.* Lenheim, 89 Pa. 497, in support of his contention; but this case seems to stand by itself. Mr. Freeman (?) in his note to the case (33 Am. Rep. 778), says that the case 'is utterly opposed to the decisions in all the other states, and that it is quite difficult to reconcile it with previous decisions in the same state.' A subsequent case in the same state (Fraim *v.* National F. Ins. Co. supra) appears to be at variance with the rule in the Lenheim Case."

South Carolina.—"An insurance company executed a valued policy of insurance against fire on "a stock of goods and merchandise" contained in plaintiff's store, in which was a condition that "the keeping of gunpowder for sale or on storage, upon or in the premises insured, shall render the policy void." Held, that the keeping of small quantities of gunpowder in kegs for retail, as part of the stock of goods kept for sale, did not vitiate the policy. Leggett *v.* Aetna Ins. Co., 10 Rich. Law 202.

Tennessee.—Under a fire policy covering a number of enumerated articles and "such other merchandise as is usually kept for sale in a retail hardware store," the insured had a right to carry in stock a small quantity of dynamite, it being shown that it was customary among hardware merchants in the vicinity to keep this article in stock. Traders' Ins. Co. *v.* Dobbins & Ewing, 86 S. W. 383, 114 Tenn. 227.

Texas.—A prohibition in a fire insurance policy of the use of gasoline is repugnant to insurance therein of household and kitchen furniture and family stores where it appears that gasoline and gasoline stoves are, in the vicinity, an ordinary part of such furniture and stores; and hence the keeping of gasoline for domestic purposes does not work a forfeiture. American Cent. Ins. Co. *v.* Green, 41 S. W. 74, 16 Tex. Civ. App. 531.

Federal Courts.—In Plinsky *v.* Germania, etc., Ins. Co. (C. C.) 32 Fed. 47, where a policy upon a "stock of candies, confectionery, toys, fruit, and all such other stock as is usually kept for sale in confec-

tionery stores," provided that such policy should "cease and determine if * * * fire-works should be kept temporarily or otherwise in the stocks of merchandise * * * insured herein," it was held that, if fire-works were usually kept in stocks of the kind insured, the written part of the policy would control the printed part, and the keeping of fire-works would not avoid the policy. The court said: "The rule in such cases is well settled that, if the prohibited article be usually kept in the stock insured, the written part of the policy shall control the printed portion, and the keeping of the prohibited article will not avoid the policy. The Massachusetts cases are the other way, but the law is too firmly settled to be disturbed. Wood, Fire Ins. 169, 170. In this connection the case of Steinbach *v.* Insurance Co., 13 Wall. 183, was relied upon by the defendant. This was a suit upon a fire policy upon a stock of fancy goods, toys, and other articles 'contained in the brick building,' etc., 'and now in his occupancy as a German jobber and importer, privileged to keep fire-crackers on sale.' The insured not only kept fire-crackers on sale, but fire-works, which were classed as hazardous, and for which an extra premium was charged. The court held the policy to have been avoided, apparently upon the ground that the privilege to keep fire-crackers on sale was an exclusion of the right to keep other hazardous articles, notwithstanding the testimony that fire-works constituted an article in the line of business of a German importer. In this particular the case is distinguished from the one under consideration. If it were not, of course I should feel compelled to follow it, notwithstanding its authority was repudiated by the court of appeals of New York (Steinbach *v.* Insurance Co., 54 N. Y. 90), and has been gravely doubted by other courts. See Stout *v.* Insurance Co., 12 Fed. Rep. 554. If there had been a special provision in the written portion of the policy, permitting certain hazardous articles to be kept, we should have held, following this case, that there was an implied prohibition of other hazardous articles, upon the familiar principle, expressio unius est exclusio alterius. But we think that the undisputed testimony that fire-works were kept as an ordinary portion of a stock of confectionery and toys was clearly admissible."

Words "Such as Are Usually Kept" Need Not Be Used.—That many of the above cases involved policies containing the words "such as are usually kept in a country store," does not seem to affect the case. In Wood on Insurance, p. 840, quoted in Collins *v.* Farmville Ins. and Banking Co., 79 N. C. 279, 28 Am. Rep. 322, it is said: "And when a policy covers a stock of merchandise which is in fact kept in a country store, although the words, such as are usually kept in a country store, are not used, the policy will not be invalidated by the keeping of articles embraced under the list of hazards, if the articles so kept are usually kept in such stores, although in the printed provisions of such policy the keeping of such articles is specially prohibited."

Cases Contra.—"The contrary has, however, been held, the court considering that express prohibitory provisions necessarily govern a custom. Macomber *v.* Howard F. Ins. Co., 7 Gray (Mass.) 257; Beer *v.* Forest City Mut. Ins. Co., 30 Ohio St. 109; Sperry *v.* Springfield F. & M. Ins. Co., 26 Fed. 234; Mason *v.* Hartford F. Ins. Co., 29 U. C. Q. B. 585." 19 Cyc., p. 738.

Pennsylvania Case.—Lancaster Fire Ins. Co. *v.* Lenheim, 89 Penn. 497. See this case distinguished supra under "Pennsylvania."

Ohio.—In Beer *v.* Insurance Co., 39 Ohio St. Rep. 109, where a policy on the assured's "general stock of hardware and agricultural implements," in a village in Ohio, provided, that "if the assured

shall keep gunpowder (or) petroleum, without written permission in this policy, then this policy shall be void," and in an action on the policy the insurer relied on a breach of the condition, it was held that evidence was not admissible to show a custom among hardware dealers in the villages in Ohio to keep for sale such articles, in limited quantities, as part of the stock. Citing cases apparently very indiscriminately. See contra Cincinnati Mut. Ins. Co. *v.* Corey, 8 West. Law J. 470.

Kansas.—"An insurance policy provided in writing for insuring 'a stock of boots and shoes, dry goods, drugs, liquors, and such other goods as are usually kept for sale in a country store,' and provided in printing that the policy should be void if gunpowder, saltpetre, etc., should be kept without 'special consent in writing indorsed on the policy, naming each article specifically.' Held, that the written and printed clauses were not repugnant, and that the policy was rendered void by keeping gunpowder on the premises without obtaining the written consent specified in such policy. Cobb, Stribling & Co. *v.* Insurance Co. of North America, 17 Kan. 492." 28 Cent. col. 1441.

Kentucky.—A policy of insurance was issued on a country storehouse, and the stock of dry goods, clothing, hardware, and groceries contained therein, but the policy provided that, if gunpowder and certain other highly inflammable substances were kept, the policy should be void. The insured had gunpowder in the store at the time the building and stock were destroyed by fire. Held, there could be no recovery on the policy, although it appeared that the agent of the company knew, when the application for insurance was made, that the insured kept gunpowder in stock, and intended to keep it, and the agent represented that the provision in the policy did not prevent the insured from keeping the powder. Such representation could not prevail against the express prohibition of the policy. Nor does the fact that gunpowder is usually kept in country stores of the kind here insured impliedly give the consent of the company to keep gunpowder, in disregard of the express provision of the policy. The court said: "Cases with reference to insurance policies may be found where the policy or its meaning has been interpreted, in the light of the circumstances surrounding its execution, that would seem to be at variance with this rule; as where a building insured is being used for the manufacture of certain articles that require the use of inflammable material, and without which the building and the business in it would be useless, it was held that the right to keep and use everything necessary to the manufacture of the articles existed, although the policy forbid it, consent having been given by the insurance company that the building insured might be used for the purpose of manufacturing the particular article. Viele *v.* Germania Ins. Co., 26 Iowa, 9; Archer *v.* Merchants' Ins. Co., 43 Mo. 434. In this case no such question can arise, and, because gunpowder is usually kept in a country retail store, it is maintained that the insured has the implied consent of the company to keep and sell that which is expressly forbidden by the written contract. The fact that an insurance is obtained upon the stock of merchandise, and that powder is usually kept and sold or classed with the articles comprising this merchandise, will not authorize the sale of powder if by the terms of the contract it is prohibited, and the policy declared void if violated in that particular. As said by the court in the case of Birmingham Fire Ins. Co. *v.* Kroegher, 83 Pa. St. 64: 'The reason for the prohibition may arise from the fact that the custom of selling gunpowder does exist in a country store, and if such articles were never found among such stocks this provision in the pol-

icy would be useless.'" Western Assur. Co. *v.* Rector, 9 Ky. L. Rep. 3, 85 Ky. 294, 3 S. W. 415, 416. It will be observed that the point that prohibitory clause must yield to written clause insuring a country store, was not raised. Also it should be noted that the stock insured was expressly limited to dry goods, clothing, hardware and groceries. This is evidently the case upon which the court in the principal case mainly relies, as the arguments there used are relied on here. American Fire Ins. Co. *v.* Nugent, 7 Ky. Law Rep. 597, lays down a different rule.

Massachusetts.—See supra under "Massachusetts."

Federal.—"Where a fire insurance policy on the stock of groceries of wholesale dealers prohibits the storing or vending of saltpetre, the condition is broken where the insured keeps one keg of saltpetre in store for the purpose of selling the same. Bayly *v.* London & L. Ins. Co., Fed. Cas. No. 1,145.

Cases Cited by the Court.—In Sperry *v.* Springfield F. & M. Ins. Co. (C. C.), 26 Fed. Reporter 234, it was held that the keeping of dynamite or giant powder in a building, without the written consent of the insurance company, avoided a policy prohibiting the keeping of nitro-glycerine in the building insured; that such a policy could not be affected by proof of custom or usage as to the keeping of dynamite or giant powder. The point that notwithstanding a policy contains a clause prohibiting the keeping of powder, fire works and other such inflammable materials, yet, that if they are usually kept as a stock in trade, or are used in the transaction of the business named, they are covered by the policy, and their use does not work its forfeiture by reason of the prohibitory clause, was not involved in the discussion of the case.

Western Assur. Co. *v.* Rector, 9 Ky. L. Rep. 3, 85 Ky. 294, 3 S. W. 415; Lancaster Fire Ins. Co. *v.* Lenheim, 88 Penn. 497, have already been considered under "Cases Contra." Steinbach *v.* Insurance Co., 13 Wall. 183, 20 L. Ed. 615, was considered supra under "Federal Cases," and is distinguished by May in his work on Insurance. See supra, where he is quoted at large. Macomber *v.* Howard Fire Ins. Co., 7 Gray, 257, is discounted by the later case, which seeks to distinguish it, of Whitmarsh *v.* Conway Fire Ins. Co., 16 Gray, 359. See ante, "Massachusetts."

Articles and Materials Necessarily Used in the Business or Trade Carried on by Insured.—There are also many cases as admitted by the court in the principal case, inapplicable here, which establish the rule that the use of such materials as are ordinarily and necessarily used in the business, the stock and materials of which are covered by the policy, will not avoid the policy, although by the printed clauses of the policy the keeping or use of such materials upon the premises is prohibited. See Harper *v.* Albany Mut. Ins. Co., 17 N. Y. 194; Bryant *v.* Poughkeepsie Ins. Co., 17 N. Y. 200; Harper *v.* New York City Ins. Co., 22 N. Y. 441; Hall *v.* Ins. Co., 58 N. Y. 292, 17 Am. Rep. 255; Szymkus *v.* Eureka Fire & Marine Ins. Co., 114 Ill. App. 401; Davis *v.* Pioneer Furniture Co., 78 N. W. 596, 102 Wis. 394; Fraim *v.* National Fire Ins. Co., 170 Pa. 151, 32 Atl. 613, 37 Wkly. Notes Cas. 39; Viele *v.* Germania Ins. Co., 26 Iowa, 9; Mears *v.* Humboldt Fire Ins. Co., 92, 15, 37 Am. Rep. 647; Russell *v.* Manufacturers' & Builders' Fire Ins. Co., 50 Minn. 409, 52 N. W. 906; Archer *v.* Merchants' & Manufacturers' Ins. Co., 43 Mo. 434.

J. F. M.